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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF.

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In aid of the Court's consideration of the Petition for Certiorari in the above-captioned matter, petitioner submits herewith "Warsaw Convention-Limited Liability Avoidance" which is reprinted verbatim from *33 Journal of Air Law and Commerce 478.*

"WARSAW CONVENTION—LIMITED LIABILITY—AVOIDANCE.

A wrongful death action was instituted against Eastern Air Lines, Inc. for death resulting from the fatal crash of an Eastern Air Lines Constellation in Florida on December 21, 1955. Eastern alleged that its liability was limited under the Warsaw Convention.[1] The plaintiff, attempting to recover damages *in excess* of the Warsaw limitation,[2] alleged in the alternative that (1) the carrier was guilty of wilful misconduct or, (2) that the carrier failed to make sufficient delivery of a ticket[3] under the Convention. In the lower court Eastern conceded that it could not maintain its burden of proof to show that it was without fault.[4] However, the

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000 (1929). T. S. 876 (1934). The Hague Protocol, to which the United States is not a party, was adopted in 1955; it was a partial revision of the Convention, *e.g.*, it increased the limit of liability from $8300 to $16,600. The United States Supplemental Agreement which went into effect May, 1966 is another attempt to increase the limit of liability. It is based on agreements between carriers, which limit liability to $75,000.00 in some instances and $58,000 in others.

2. Article 22(1) of the Convention provides: 'In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . .' ($8921.87).

3. Article 3(1) of the Convention provides: 'In respect to the carriage of passengers a ticket shall be delivered containing: (c) a notice to the effect that . . . the Warsaw Convention may be applicable. . . .' Article 3(2) provides: 'The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with consent of the carrier, the passenger embarks without a passenger ticket having been delivered . . . the carrier shall not be entitled to avail himself of the provisions of Article 22.'

4. Article 20(1) of the Convention provides: 'The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures.'

court found that Eastern was neither negligent nor guilty of wilful misconduct. But the trial [5] without jury resulted in an award to plaintiff of the $8300.00 limitation. *Held: Affirmed.* The issues of wilful misconduct and negligence were *bound together* in this case and the *burden of proving both* rested with the plaintiff; as plaintiff had not carried his burden of proof, consideration of plaintiff's contentions regarding delivery of the ticket was unnecessary. *Berguido v. Eastern Air Lines, Inc.*, 369 F. 2d 874 (3rd Cir. 1966), *petition for cert. filed*, 36 U.S.L.W. 3107 (Aug. 22, 1967) (No. 528).

Without the Warsaw Convention, there would be numerous conflicts of law problems in action involving international flights.

> The Convention of Warsaw consists of a code which lays down certain conditions of contract for international carriage. It defines and limits the rights of passengers and owners of cargo in such carriage, and the corresponding liabilities of the carrier. [I]t imposes upon the carrier a limited liability in most cases of accident . . . and an unlimited liability in some.[6]

In addition to providing uniformity of laws applicable to international air carriage, the Warsaw Convention provides in Article 22 for the limitation of the financial liability

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5. The trial upon which this appeal is based was the fifth trial of this case at the district court level. The first two, with juries, ended in mistrials. The third trial ended with a jury finding of wilful misconduct on the part of the carrier but was reversed by the appellate court on evidentiary grounds. The fourth trial before a jury ended with a verdict for the plaintiff, without a finding of wilful misconduct, but with a recovery not to exceed the Convention limitation. However, the District Court, upon plaintiff's motion, vacated its judgment and granted a new trial.

6. 1 C. SHAWCROSS & K. BEAUMONT, INTERNATIONAL LAW, 43 (2d ed. 1966).

of the carrier to $8291.87 [hereinafter $8300]. Realizing that the cause of an aircraft accident might never be ascertained, the drafters also set out that a carrier would be presumptively liable when an accident occurred [7] but could rebut the presumption and avoid liability.[8] Additionally, exceptions were drafted into the Convention which provide for *unlimited* carrier liability in cases of either failure to deliver a passenger ticket [9] or wilful misconduct.[10] Thus, a plaintiff who will be satisfied with an $8300 recovery may simply allege injury,[11] but a plaintiff who desires to recover

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7. Article 17 of the Convention provides: 'The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

8. Article 20(1) of the Convention quoted in part, *supra* note 4. Under the United States Supplemental Agreement of 1966 the carrier is *absolutely* liable, with a financial liability limit of $75,000, and is not allowed to rebut this presumption of liability. For a discussion of the history which gave rise to this supplemental agreement see *infra* note 27.

9. *See* Article 3(2), *supra* note 3. For a discussion of the history of the drafting of Article 3(2) see, H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 266-72 (1954).

10. Article 25(1) of the Convention provides: 'The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct.'

11. The Second Circuit applied the Convention in Grey v. American Airlines Inc. In stating that the carrier was absolutely liable under the Convention and recognizing that liability may be avoided through Article 20, the court said,

> As to this it is plain that the burden of proof is on the carrier. And in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be insurmountable.

Grey v. American Airlines, Inc., 227 F. 2d 282, 285 (2d Cir. 1955) *cert. denied*, 350 U. S. 989 (1956).

more than $8300 must do one of three things: (1) successfully invoke Article I(1),[12] which will make the Convention irrelevant to the litigation (thus, the laws of the country in which the action is brought would determine the amount to be recovered); (2) plead wilful misconduct, or (3) plead the carrier's failure to deliver to the passenger a ticket with an adequate notice of liability.[13]

As to the last point, English authorities hold that a carrier failing to deliver a sufficient ticket remains prima facie liable; it is not entitled to the benefits of the Convention but is subject to its liabilities.[14] American cases are unequivocal in holding that without delivery of a sufficient ticket the carrier is *absolutely* liable for the full amount of

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12. Article I(1) of the Convention provides: 'This Convention applies to *all international* carriage of persons, luggage, or goods performed by aircraft for reward. . . .' The reference to 'all international carriage' impliedly excludes carriage which is not international in nature.

13. Delivery of a ticket which fails to give adequate notice of liability results in an insufficient delivery of the ticket.

14. Westminster Bank, Ltd. v. Imperial Airways, Ltd., [1936] 2 All. E. R. 890. This case involved a failure to deliver an air consignment note that listed all the particulars required by the Convention, rather than an inadequate delivery of a passenger ticket, but the statements that outline limited liability and avoidance of liability apply equally to a failure to comply with the ticket requirements and the air consignment note requirements. In giving judgment for the plaintiff the court held that under the Warsaw Convention the carrier is prima facie liable for injuries that occur during the course of transport, that the carrier can avoid this liability through Article 20, *but* that it is absolutely and unlimitedly liable if it fails to deliver an adequate air consignment note. *See also* Philippson v. Imperial Airways, Ltd., [1939] 63 Lloyd's List L. R. 119.

Shawcross and Beaumont note that 'When a carrier has failed to deliver a ticket he will be absolutely liable for the full amount of any damages arising under Articles 17 or 19 . . . . ., and since the carrier is not entitled to avail himself of the provisions of Article 20(1) and probably Article 21 which exclude this liability, nor of those which limit it, he remains subject to his full prima facie liability.' 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 441.

any damages proven by the plaintiff.[15] In *Lisi v. Alitalia-Linee,*[16] the carrier argued that its liability was limited because it had delivered a ticket, but the court found that the ticket delivery was insufficient because the size of the print made the notice of liability inadequate, and consequently the carrier could not limit its liability nor avail itself of any defense provided by the Convention.[17] Both *Lisi* and *Mertens v. Flying Tiger Airlines, Inc.*[18] discussed delivery of a passenger ticket with adequate notice of liability. In *Mertens* the carrier argued that Article 3(2) merely requires delivery of a passenger ticket,[19] but the court said that Article

15. Lisi v. Alitalia-Linee, 370 F. 2d 508 (2d Cir. 1966), *cert. granted,* 26 U. S. L. W. 3185 (U. S. Nov. 7, 1967) (No. 70); Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851 (2d Cir. 1965), *cert. denied,* 382 U. S. 830, *reh. denied,* 382 U. S. 933 (1965).

16. 370 F. 2d 508 (2d Cir. 1966).

17. *Id.* at 514. In *Mertens* the notice of the carrier's limited liability 'was so printed in such manner as to virtually be unnoticeable and unreadable.' 341 F. 2d at 857. In criticizing the 'Lilliputian print' of the ticket the court held at the same page that 'as a matter of law' the delivery of the ticket was inadequate. *But see* Seth v. British Overseas Airways Corp., 329 F. 2d 302 (1st Cir.), *cert. denied,* 379 U. S. 858 (1964). *Lisi* quoted the *Mertens* decision with approval and reasoned that a condition precedent to the carrier's defense of limited liability is delivery to the passenger of a ticket which gives him notice that his recovery is limited in the event of a crash. 370 F. 2d at 513.

18. 341 F. 2d 851 and 370 F. 2d 508.

19. The carrier maintained that the Article 3(2) requirements are less than those of Article 4(4), which requires that a luggage ticket state all the particulars of the article. This interpretation of the distinction between the articles had been upheld in the *Grey* litigation where the court stated: 'Art. 3(2) merely requires that the ticket be delivered to the passengers and thus clearly differs from Articles 4(4) and 9. I must conclude that this omission or difference is most significant.' Grey v. American Airlines, 95 F. Supp. 756, 758 (S. D. N. Y. 1950). The *Lisi* court distinguished the *Grey* rule that mere ticket delivery is sufficient by saying that the ticket issued in *Grey* involved the failure of the carrier to list a stopping place. 'As the failure to list such a stopping place did not change the international character of the flight, the passenger was not deprived of a reasonable opportunity to take self-protective measures.' Therefore, the ticket had been delivered. 370 F. 2d at 513.

3(2) requires a delivery of a ticket that will afford the passenger a reasonable opportunity to take some self-protective measures.[20] The court reasoned that otherwise there would have been no reason for the Convention (1) to require that the ticket state the limited liability of the carrier, (2) to require that the ticket be delivered to the passenger, and (3) then further to provide for a higher limit of liability if the carrier and passenger so agree.[21]

Once a court determines that Article 25 or Article 3(2) applies, the burden of proving inadequate delivery of a ticket or wilful misconduct then becomes crucial. Some writers think that the 'quid pro quo' for the Convention's absolute but limited recovery is the shift of the burden of proof to the carrier.[22] Thus, if the plaintiff seeks an amount *above* the Convention limit, the burden lies with him to establish the necessary elements of Articles 25 or Article 3(2). If wilful misconduct is at issue the plaintiff must bear the burden of proof.[23] If the plaintiff alleges inadequate ticket delivery, the *Mertens* court said, indirectly, that the plaintiff must prove non-delivery of a ticket or delivery of an insufficient ticket: 'The jury decided that plaintiff had failed to prove . . . that no ticket was ever delivered to the decedent.'[24] A plaintiff, then, has the burden of proving inadequate ticket delivery just as he must prove

20. 341 F. 2d at 856.

21. *Id.* at 857.

22. *See* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 12, 18-26 (1954).

23. Grey v. American Airlines, Inc., 227 F. 2d 282, 285 (2d Cir. 1955). Shawcross and Beaumont, in their discussion of the loss of the carrier's protection due to wilful misconduct suggest that, 'The burden of proving that the carrier has lost its protection is presumably on the plaintiff." 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 456.

24. 341 F. 2d at 856. Notwithstanding this jury finding, the court found the ticket inadequate as a matter of law.

wilful misconduct. The rationale is that when a plaintiff seeks more than the $8300 limitation of liability, he must bear the burden of proving his cause for avoiding the limitation. It is clear that when a plaintiff alleges inadequate ticket delivery, even in conjunction with wilful misconduct, he is required to prove *only one* of these two allegations.[25]

Under the Convention, unless the carrier proves the contrary, it is presumed to be negligent. Hence the unusual decision in *Berguido,* the first case to adjudge a carrier non-negligent without the carrier's proving that it was without fault. Indeed, in *Berguido,* the carrier *admitted* that it could not prove its lack of negligence. The court then went further and *placed the burden of proving negligence on the plaintiff* because he sought to recover on the ground of inadequate ticket delivery as well as wilful misconduct.[26] In this the court erred because the plaintiff always has available the presumption of liability set out in Article 17: if the plaintiff pleads wilful misconduct and fails to prove it, he should be entitled to have judgment entered in his favor on the negligence issue unless the carrier rebuts the presumption of fault.

Mertens is in stark contrast to *Berguido* on this issue because in *Mertens* the issues of wilful misconduct and inadequate ticket delivery were raised and, although the plain-

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25. The ticket problem was ruled out as an issue during the pre-trial hearing. For this reason, the plaintiff, even though he had a valid point, was foreclosed from ever raising the issue again. Also, the plaintiff himself assumed that without a valid ticket the Convention rule of presumed negligence did not apply, that the litigation was outside the Convention, and that he had to prove negligence. It was only on petition for re-hearing that the plaintiff first recognized his mistake. Article 3(2) plainly states that even with an inadequate ticket delivery the contract of carriage is still under the rules of the Convention.

26. The court apparently reached its decision on the theory that the scheme of the Convention does not support unlimited liability.

tiff failed to prove wilful misconduct, the ticket was inadequate and he was allowed a new trial on the issue of damages alone. *Mertens* clearly implies that negligence and wilful misconduct *are not* bound together and that the plaintiff should *never* have to prove negligence under the Convention. Stated another way, the plaintiff only has to prove facts that will *increase* liability.

In conclusion, an award of *any* amount with a specific finding that the carrier was without fault is inconsistent and impossible under the Warsaw Convention. Unless the carrier affirmatively shows that it was without fault, the plaintiff is entitled to the limited award with an unlimited award always an existing possibility. The articles of the Convention are of equal weight; hence, the articles providing for absolute but limited liability cannot be interpreted so as to exclude or overrule the article providing for unlimited recovery.

As an aside to the *Berguido* issues, one can predict that the *Lisi* decision holding that a ticket must effectively warn the passenger that his recovery is limited in order to be validly delivered is, in all probability, going to be a bitter pill for the airlines. Either the carriers will have to show in boldface print the limitation of liability (with all its attendant psychological effects) or the courts are going to take this perfect avenue to avoid a limitation that has become the source of extreme discontent within the United States.[27]

Joan T. Winn

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27. On 15 November 1965 the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months. On 14 May 1966 the United States withdrew this notice. For a discussion of the subject see *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. Air L. & Com. 243 (1966)."

Respectfully submited,

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